Supreme Court, U.S.
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No. ——

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IN THE

Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

FUJITSU LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The documentation and liability rules of a treaty system known as the Warsaw Convention govern the approximately $600 billion of goods annually that enter and depart the United States by air. The now-archaic rules of the original 1929 Warsaw Convention were in force for the United States from October 29, 1934 until March 4, 1999. On the latter date, amendments contained in Montreal Protocol No. 4 of 1975, which incorporates The Hague Protocol of 1955, entered into force for the United States. The Second Circuit's decision below reflects the confusion in the lower courts about the application of these amendments. Among the questions presented is a question of treaty jurisdiction resolved by this Court two hundred years ago.

The questions presented are:

1) Whether the entry into force of treaty amendments that repeal remedies available under the original treaty extinguishes those repealed remedies with respect to transactions that occurred before their entry into force, absent a transition rule or savings clause that preserves the application of those remedies.

2) Whether the 1969 Vienna Convention on the Law of Treaties, a treaty that the United States has not ratified, creates a rule of law that supersedes this Court's consistent rulings.

3) Whether a court may impose duties and obligations on a carrier that conflict with both the original and amended Warsaw Convention and are also not authorized by any other law, and then set aside the Convention's liability limits because the carrier did not properly fulfill those duties and obligations.

PARTIES TO THE PROCEEDING

Petitioner Federal Express Corporation is a wholly owned subsidiary of FedEx Corporation. The stock of FedEx Corporation is publicly traded on the New York Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

Federal Express Corporation hereby petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 247 F.3d 423. App., 1a-21a. The district court's order and memorandum granting respondent partial summary judgment based on its decision that the Warsaw Convention's liability limits were inapplicable is reported at 76 F. Supp. 2d 474. App., 22a-25a. Thereafter, a bench trial was held in which respondent prevailed. App., 26a.

JURISDICTION

The court of appeals entered its judgment on April 20, 2001. *Fujitsu* at 243. App., 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Because this case involves matters of treaty interpretation, it necessarily implicates the President's "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present occur." U.S. CONST. art. II, § 2, cl. 2. The specific treaty involved in this case is the Warsaw Convention and its amending instruments, the full texts of which are being lodged with the Court for its convenience. These instruments are:

> 1) The original 1929 Warsaw Convention. Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw on Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 40105 note (1994).

2) The Hague Protocol of 1955. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at The Hague, Sept. 28, 1955, 478 U.N.T.S. 371.

3) Montreal Protocol No. 4 of 1975. Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as amended by the Protocol done at The Hague on September 28, 1955, Sept. 25, 1975, TIAS No. ___, *reprinted in* ICAO DOC. NO. 9148 (1975).

The consolidated text of the amended Warsaw Convention and certain relevant unamended provisions from the original 1929 Warsaw Convention are in the Appendix at 27a-51a.

The statute governing the repeal of statutes, 1 U.S.C. § 109, states in relevant part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

STATEMENT OF THE CASE

This case presents a question fundamental to the jurisdiction of United States courts. The courts have no inherent authority to enforce remedies that have been repealed, a principle now reflected in the well-established doctrine of abatement. *Hertz v. Woodman*, 218 U.S. 205 (1910). The Court has consistently applied this principle throughout its history. The court of appeals contradicted that principle and unilaterally rewrote the international liability regime for the transportation of air cargo.

In 1817, Congress passed a statute that has become known as the General Savings Statute, now codified at 1 U.S.C. § 109. That statute ensures generally that statutory remedies continue to apply to events occurring before their amendment or repeal. The General Savings Statute, however, does not apply to treaties, as the court of appeals below held. *Fujitsu* at 431-34. App., 12a-18a. Treaties continue to be governed by the rule that courts must apply treaties in effect at the time of decision, handed down by this Court two hundred years ago in *The SCHOONER PEGGY*, 5 U.S. 103 (1801).

This case involves the application of the Court's precedent on the abatement doctrine to the Warsaw Convention, one of the most widely adhered to and important treaties in existence. The district court had jurisdiction under 28 U.S.C. § 1331.

1. *Air Cargo and the Warsaw Convention.* Air cargo issues are extremely important because nearly $600 billion of goods annually enter and depart the United States by air. U.S. DEPARTMENT OF COMMERCE, U.S. MERCHANDISE TRADE SELECTION HIGHLIGHTS, REPORT FT 920 (2000). Those goods are carried under the documentation and liability rules of the Warsaw Convention, and this commerce depends on the uniform and predictable application of those rules.

The original 1929 Warsaw Convention contains now-archaic documentation requirements incompatible with the modern realities of international air transportation of cargo. Those archaic requirements were deleted in amendments to the Convention contained in both The Hague Protocol of 1955 and Montreal Protocol No. 4 of 1975. The United States, however, failed to adopt either of those amendments until it ratified Montreal Protocol No. 4 in 1998. Montreal Protocol No. 4 incorporates The Hague Protocol of 1955. S. EXEC. REP. No. 105-20 at 8 (1998), Lodging, at 51.

Until Montreal Protocol No. 4 and The Hague Protocol entered into force for the United States on March 4, 1999, the United States was the last major air cargo market in the world that continued to be subject to the original 1929 Warsaw Convention's archaic documentation rules. Those rules created nearly $1 billion in unnecessary costs annually. S. EXEC. REP. No. 105-20 at 5 (1998), Lodging, at 48.

2. *The Second Circuit and the Warsaw Convention.* The case law of the Second Circuit has elevated the form of the original 1929 Warsaw Convention's requirements over the substance of the Convention and its goals. These cases reflect that court's erroneous assumption that limited liability under the Convention's rules is a "significant benefit" to carriers and is not otherwise enforceable. *Fujitsu*, at 429. App. 7a. Accordingly, its decisions have consistently held that the carrier cannot enforce cargo liability limits if it accepts goods in circumstances where the shipper fails to comply with the Warsaw Convention's archaic documentation rules.

The Second Circuit's rulings are out of step with law and economic policy. In all other contexts, cargo liability limits are fully enforceable, including transportation subject to the Warsaw Convention's rules as amended by either The Hague Protocol or Montreal Protocol No. 4 (or both), and air transportation not governed by the Convention's rules at all. In fact, liability limits for cargo are generally enforceable in all other modes of transportation. Unlike the case with passengers, these limits are enforceable because cargo transactions, particularly shipments of valuable freight, generally involve sophisticated shippers that insure the value of their shipments above the widely known liability limit. Shippers are in the best position to determine the insurable value of their goods.

This case is the most recent in a line of Second Circuit decisions that fundamentally disturb the operation of the

Warsaw system.[1] These decisions create confusion among the lower courts, threatening the uniform application of the Convention's rules.

3. *The Shipment in Question.* The initial shipment that gave rise to this dispute began on May 30, 1996. FedEx accepted for shipment a container of valuable silicon wafers for Fujitsu Limited (Fujitsu), the consignor, at Narita, Japan. The shipment was consigned to a now-defunct affiliate of Fujitsu, Ross Technologies, Inc. (Ross), in Austin, Texas. Accompanying the shipment was an air waybill, designated as AWB 3691. It was in all respects complete, as the court of appeals found. *Fujitsu* at 429. App., 7a.

An air waybill is a contract for carriage of goods by air made out by the consignor on forms supplied by the carrier. App., 46a. As such, it is comparable to a bill of lading, which is a contract for the shipment of goods by surface, including water transportation. Modern air waybills, however, also contain computer bar codes that express air carriers, like FedEx, use to monitor or track the movement of a shipment electronically.

On May 31, 1996, the shipment arrived at its destination in Austin and was placed in a FedEx bonded facility to await customs clearance by Ross' customs agent. However, Ross' customs agent faxed a notification to FedEx rejecting the

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[1] *See, e.g., Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999); *Franklin Mint Corp. v. TWA*, 690 F.2d 303 (2d Cir. 1982), *aff'd on other grounds*, 466 U.S. 243, 246 (1984) (rejecting the Second Circuit's "declaration that the Convention is prospectively unenforceable"); *Intercargo Ins. Co. v. China Airlines, Ltd.*, 208 F.3d 64 (2d Cir. 2000) (refusing to enforce cargo liability limits even after finding agreed stopping places had been incorporated effectively); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301 (2d Cir. 2000) (requiring bilateral treaty relations, a test not found in this multilateral treaty and that conflicts with its express terms), *cert. denied*, 2001 WL 703956 (2001); *Maritime Ins. Co., Ltd. v. Emery Air Freight Corp.*, 983 F.2d 437 (2d Cir. 1993).

shipment without inspecting it. Subsequently, FedEx received oral instructions from Fujitsu and written instructions from Ross to return the shipment to Fujitsu in Japan. Ross agreed to pay the costs of the return. *Fujitsu* at 426. App., 3a.

The container was returned to FedEx's hub in Memphis, where FedEx used a new air waybill *form* to ensure and track its return to Japan. The new air waybill form was not made out by either Fujitsu or Ross. It was therefore not a completed air waybill. It did contain the legend "RETURN OF [AWB 3691]," listed Ross as shipper, and indicated that the goods were to be shipped from Austin to Narita. *Fujitsu* at 427. App., 3a. The cargo was damaged during the return. *Fujitsu* at 427. App., 4a.

4. *The Proceedings Below.* Fujitsu filed this action against FedEx in the United States District Court for the Southern District of New York. That court recognized that "an air waybill, like all contracts, acknowledges an agreement of the parties." App., 24a.

The District Court allowed Fujitsu to assert successfully that the incomplete air waybill form used by FedEx internally to facilitate the return of the goods was an incomplete contract of carriage that rendered the Warsaw Convention's liability limits unenforceable, even though neither Fujitsu nor Ross was a party to it. The asserted deficiency was the failure to complete the archaic documentation requirements for air waybills specified in the original unamended Warsaw Convention, *i.e.*, to comply with the particulars of Article 8, including by specifying the agreed stopping places.[2] But the completion of those particulars is the responsibility of the

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[2] Article 8 of the original 1929 Warsaw Convention requires that an air waybill contain seventeen particulars, the vast majority of which are commercially insignificant. Article 8 of the Convention, as amended by The Hague Protocol, retains only three of these. App., 31a-32a.

consignor (shipper) under Article 9. In effect, the court allowed Fujitsu to avoid the liability rules it had agreed to contractually in the original air waybill based on the incompleteness of the second air waybill form. The second form, however, was never actually executed by either the shipper or the carrier as an air waybill, or contract of carriage.

On March 4, 1999, eight months before the District Court granted Fujitsu's motion for partial summary judgment and a year before amended judgment was entered against FedEx for unlimited damages of $908,296.14 (including interest), the law of the Warsaw Convention changed. The changes repealed the archaic requirement that the consignor list the particulars specified in Article 8, as well as the remedy of unlimited liability under Article 9 where the carrier accepts goods with an incomplete air waybill unless the waybill omits notice of the Convention's applicability entirely. On that date, Montreal Protocol No. 4 of 1975, which incorporates The Hague Protocol of 1955, entered into force for the United States. The Hague Protocol had entered into force for Japan on August 11, 1967. Montreal Protocol No. 4, in turn, entered into force for Japan on September 18, 2000. Unlike some other international treaties amending pre-existing instruments, neither instrument contains a savings clause or transition rule limiting the effect of its changes to events occurring after its entry into force.

On April 20, 2001, the Second Circuit affirmed the District Court's holding. *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423 (2d Cir. 2001). It relied upon customary international law as "enunciated" in the 1969 Vienna Convention on the Law of Treaties, an instrument never ratified by the United States, to find treaty jurisdiction to apply and enforce the repealed provisions of the original 1929 Warsaw Convention, *i.e.*, the required particulars of Article 8 and the remedy of unlimited liability under Article 9. The court apparently overlooked the fact that the 1969 Vienna Convention (as well as the rules of customary international

law it reflects) does not by its terms apply to treaties that predate it, such as The Hague Protocol of 1955. In dicta, the court declared its "view" that FedEx would not prevail under the amended Convention "apparently" because a new air waybill was not made out for the return. *Fujitsu* at 434. App., 17a.

REASONS FOR GRANTING THE WRIT

Petitioner seeks review because the decision below (1) conflicts directly with this Court's decision in *The SCHOONER PEGGY* and with this Court's later decisions on the abatement doctrine; (2) legislates new international law in conflict with the common law of the United States, thereby circumventing the ratification procedures of the Constitution; and (3) imposes duties and obligations on air carriers not authorized by the Warsaw Convention or any other law.

Recent amendments to the Warsaw Convention entered into force for the United States without any savings clause or transition rule to preserve the jurisdiction of courts to enforce the remedies they repeal. In an effort to avoid applying those amendments, the decision below creates new international law that conflicts with this Court's decisions and the common law. In essence, the Second Circuit simply refused to apply this Court's precedents, much like the Ohio Supreme Court did in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). Moreover, it is not the Second Circuit's role to determine the effective date of new law. Its role is to declare and apply the law as it exists at the time of its decision. Only the executive and legislative branches have the right, either by legislation or the making of treaties, to give the judicial branch the authority to continue enforcing remedies otherwise abated by amendment or appeal.

The question of the entry into force of the amendments to the Warsaw Convention will be a recurring one. Currently, Montreal Protocol No. 4 has entered into force for only fifty-one countries. Its provisions apply principally to cargo

and take effect for shipments moving between countries party to that instrument. Lodging, at 42. As more countries become party to Montreal Protocol No. 4, the correct application of its amendments will be a recurring issue. Further, on May 28, 1999, the United States signed a comprehensive revision and restatement of the Warsaw Convention, the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999 (known as the Montreal Convention of 1999). S. TREATY DOC. NO. 106-45 (2000). That new instrument, which is pending in the United States Senate for its advice and consent to ratification, also contains no savings clauses or transition rules. Its provisions will provide significant benefits to the United States upon its entry into force, especially to passengers who are U.S. domiciliaries. Resolution of the questions presented here, therefore, will provide needed guidance to the courts and all affected by these treaties—passengers, shippers and carriers.

The Second Circuit not only applied the wrong treaty provisions, but it applied even those repealed provisions incorrectly. Because of its apparent hostility to liability limits, even between a highly sophisticated shipper and carrier, it expanded the remedy of unlimited liability set forth in the original 1929 Warsaw Convention to circumstances where it clearly does not apply. It grafted onto the Convention a requirement that the *carrier* prepare a new air waybill for returns, even though neither the Warsaw Convention nor carrier conditions of carriage governing returns so require. Under the Warsaw Convention and those conditions, FedEx has no duty or right to require the execution of a new air waybill for a return movement. Accordingly, FedEx lawfully cannot be deprived of its right to limit its liability because it failed to insist on a second, properly completed air waybill. The Second Circuit's holding to the contrary is improper. The holding of the Second Circuit will generate new law inconsistent with the worldwide operation of the

Warsaw Convention, and confusion concerning the proper handling of international shipments by air worth billions of dollars.

I. *Certiorari* Should be Granted Because the Decision Below Conflicts Directly with the Decisions of this Court and the Common Law Doctrine of Abatement.

At the time of the transportation at issue, the original 1929 Warsaw Convention was in effect for the United States. However, the specific language of Article 9 of the original 1929 Convention, upon which the District Court below relied, was "deleted and replaced" by the entry into force of The Hague Protocol. In other words, it was repealed.[3] Specifically, as of March 4, 1999, Fujitsu's remedy under Article 9 of the original 1929 Convention to break the carrier's liability limit was abated because the carrier accepted goods despite an incomplete air waybill.[4]

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[3] Article VII of The Hague Protocol states:

Article 9 of the Convention shall be deleted and replaced by the following:

> "If with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph (c), the carrier shall not be entitled to avail himself of the provisions of Article 22, paragraph 2."

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at The Hague, Sept. 28, 1955, art. VII, 478 U.N.T.S. 371. Lodging, at 24-36.

[4] On September 18, 2000, Montreal Protocol No. 4 entered into force for Japan. Article III of Montreal Protocol No. 4 deletes and replaces Section III (Articles 5-16) of the Convention (as amended by the Hague Protocol) in its entirety. Lodging, at 38. New Article 9 of the Convention, provides:

The seminal case regarding the abatement of a remedy due to the entry into force of a treaty is *The SCHOONER PEGGY*, 5 U.S. 103 (1801). In that case, the court of appeals had ordered condemnation of a vessel, but while the case was on appeal to this Court, the United States and France entered into a treaty providing for the restoration of captured property. This Court ruled that the new treaty should be applied:

> where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress.

Id. at 110. Finding that a court must decide an appeal according to existing law, this Court set aside the capture judgment.

The Hague Protocol, unlike some other protocols amending treaties, does not contain any transition rule or savings clause preserving the jurisdiction of courts to enforce remedies available under the original 1929 Warsaw Convention for events that take place before the Protocol enters into force. Nor does any Congressional enactment so provide, as discussed below. Therefore, the remedies repealed by The Hague Protocol are abated and extinguished on the date it enters into force.[5] This Court has explained the principle of abatement as follows:

> "Non-compliance with the provisions of Articles 5 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability."

Montreal Protocol No. 4 is now in effect for both Japan and the United States. Its amendments also eliminate Fujutsu's remedy, but the differences between The Hague Protocol and Montreal Protocol No. 4 versions of Article 9 are not relevant to this case.

[5] As the court of appeals noted, this case is not about the retroactive application of new treaty amendments. *Fujitsu* at 432. App. 14a. Rather, it is about the jurisdiction of a court to apply a remedy that has been rescinded.

> There are cases which go so far as to say that the unqualified repeal of a law as effectually destroys rights and liabilities dependent upon it, not past and concluded, as if the statute had never existed. It is, however, putting it strongly enough to say that an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations, and as a remission of penalties and forfeitures dependent upon the destroyed statute.

Hertz v. Woodman, 218 U.S. 205, 216 (1910) (citations omitted).

Fujitsu's right to break the liability limits that are specified both in the Warsaw Convention and in its contract of carriage (*i.e.*, the air waybill) is inchoate. Fujitsu has no right under the Convention to recover unlimited damages—for which it has not contracted—until and unless an action is brought and a final judicial determination is made that the carrier is not "entitled to avail himself" of those liability limits under Article 9 of the unamended Convention.

The abatement doctrine is a well-settled canon of statutory construction. This Court has consistently found that "after the expiration or repeal of a law, no penalty can be enforced."[6] The leading treatise in this area describes the doctrine as follows:

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[6] *The GENERAL PICKNEY*, 9 U.S. 281, 283 (1809); *see also, Merchants' Ins. Co. v. Ritchie*, 72 U.S. 541, 544 (1866) (holding that "when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction"); *Ex parte McCardle*, 74 U.S. 506, 514 (1868) (citations omitted) (dismissing petition for want of jurisdiction because "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed"); *Hertz v. Woodman*, 218 U.S. 205, 216 (1910); *U.S. v. Chambers*, 291 U.S. 217 (1934) (holding that repeal of the National Prohibition Act terminated the court's authority to enforce the Act); *Ziffrin, Inc. v. U.S.*, 318 U.S. 73, 78 (1943) (holding that a "change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law."); *Bruner v. U.S.*, 343 U.S. 112 (1952) (dismissing overtime compensation

> The effect of the repeal of a statute having neither a saving clause nor a general saving statute to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute. Except as to proceedings past and closed, the statute is considered as if it had never existed.

1A SUTHERLAND STATUTORY CONSTRUCTION, § 23.33, at 424 (Norman J. Singer ed., 5th ed. 1993) (citations omitted).

The decision below conflicts directly with these precedents. Moreover, it will exacerbate the confusion that already exists among the lower courts in this area, threatening the uniform application of the Convention's rules. Eighteen courts have considered the Protocol's applicability to events that occurred before its entry into force until the date of this filing. Three courts have applied Montreal Protocol No. 4.[7] In addition to the *Fujitsu* court, six courts have decided not to apply the treaty amendments.[8] Eight courts, recognizing the

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claim where district court jurisdiction was withdrawn after certiorari was granted); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964) (vacating convictions and dismissing prosecutions when 1964 Civil Rights Act decriminalized peaceful attempts to be served on an equal basis); *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268 (1969) (refusing to enforce an eviction where housing authority had failed to comply with administrative regulation adopted after eviction proceeding started).

[7] *In re Air Crash off Point Mugu*, MDL Docket No. 00-1343-Cal, 2001 U.S. Dist. LEXIS 7931 (N.D. Cal. May 1, 2001); *Brandt v. American Airlines Inc.*, No. C 98-2089SI, 1999 WL 1269187 (N.D. Cal. Mar. 13, 2000); *Hermano v. United Airlines*, No. C 99-0105SI, 1999 U.S. Dist. LEXIS 19808 (N.D. Cal. Dec. 21, 1999).

[8] *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 314 n.4 (2d Cir. 2000), *cert. denied*, 2001 WL 703956 (2001); *Cruz v. American Airlines, Inc.*, 193 F.3d 526, 530 n.4 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1144 (2000); *Fireman's Fund Ins. v. El Al Israel Airlines, Ltd.*, No. 99 C 3801, 2001 WL 32847 (N.D. Ill. Jan. 12, 2001); *Perri v. Delta Air Lines, Inc.*, 104 F. Supp. 2d 164 (E.D.N.Y. 2000); *Republic Nat'l Bank v. Delta Airlines*, 98 Civ. 8729 (JSM), 2000 U.S. Dist. LEXIS 8652, at *7

Protocol's potential relevance, have held that in the circumstances presented, the amendments would not change the outcome.[9] Most courts in the latter category were dealing with an amendment that clarified a prior treaty provision, and could thus avoid resolving the applicability question. Numerous other courts apparently have been unaware of the changes.

The Second Circuit also relied improperly on customary international law which, according to the court, was "enunciated" in the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (May 23, 1969). The United States has not ratified that treaty.

The court erred by relying on the law reflected in the 1969 Vienna Convention to determine the effectiveness of The Hague Protocol of 1955 for four additional reasons. First, Article 4 of that Convention specifically prohibits giving retroactive effect to the rules of that Convention. The Vienna Convention applies "only to treaties concluded after the entry into force of the Convention with regard to such States." CONGRESSIONAL RESEARCH SERVICE LIBRARY OF CONGRESS, 98TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. PRT. 98-205, at 273-74 (1984). Then-Secretary of State Rogers stated that the "non-retroactivity feature (Article 4) is of

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(S.D.N.Y. June 22, 2000) (following *Chubb*); *Sotheby's v. Federal Exp. Corp.*, 97 F. Supp. 2d 497 n.3 (S.D.N.Y. 2000).

[9] *Piamba Cortes v. American Airlines Inc.*, 177 F.3d 1272 (11th Cir. 1999); *Carey v. United Air Lines*, Inc. No. 00-35069, 2001 WL 740793 (9th Cir. July 3, 2001); *Bayer Corp. v. British Airways, LLC*, 210 F.3d 236 (4th Cir. 2000); *Weiss v. American Airlines, Inc.*, No. 01 C-5026, 2001 WL 766896 (N.D. Ill. July 3, 2001); *D'Alessandro v. American Airlines, Inc.* 139 F. Supp. 2d 305 (E.D.N.Y. 2001); *In Re: American Airlines, Inc. Flight 869 Turbulence Incident Of January 17, 1996*, 128 F. Supp. 2d 1367 (S.D. Fla. Jan. 16, 2001); *Asher v. United Airlines*, 70 F. Supp. 2d 614, 617 (S.D. Md. 1999); *McDowell v. Continental Airlines*, 54 F.Supp. 2d 1313 (S.D. Fla. 1999).

substantial importance because it avoids the possibility of reopening old international disputes." *Id.* Second, the rules of the Vienna Convention are important guides not only to the construction but also to the drafting of treaties. Their application to pre-existing instruments is therefore inappropriate. Third, as the Second Circuit itself has previously noted, "where [the State Department] has not recognized the Vienna Convention as codifying customary international law, it has adopted it as customary law going forward"—not for treaties adopted years before it was drafted. *Chubb & Son v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000), *cert. denied* 2001 WL 703956 (2001) (citation omitted).[10] Fourth, it has been recognized specifically that Article 28 of the Vienna Convention, concerning the so-called "non-retroactivity" of treaties, applies only to treaties concluded after its entry into force. 14 MARJORIE M. WHITEMAN, DIG. OF INT'L L. § 31, at 330-31 (1970). Thus, the Second Circuit erred in applying the rules of the Vienna Convention as a guide to interpreting the 1955 Hague Protocol.[11]

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[10] Moreover, the Vienna Convention differs from U.S. foreign relations law in other significant ways, including in the ability to use supplementary means, such as Executive branch views, as an aid to interpretation. *See, e.g.*, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 98th CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. PRT. 98-205, at 135-36 (1984).

[11] The court also relied on § 322 of the Restatement of U.S. Foreign Relations Law. Since the Restatement is based principally on the Vienna Convention, the court also erred in relying on the Restatement. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 322 and cmt. a (1987).

II. *Certiorari* Should be Granted Because the Decision Below Legislates New International Law in Conflict with the Common Law and this Court's Consistent Rulings, Thereby Circumventing the Constitution's Ratification Procedures.

Neither The Hague Protocol of 1955 nor Montreal Protocol No. 4 of 1975 contains a savings clause or other transition rule limiting their effectiveness to events that take place after their entry into force. In this respect, they differ from other liability treaties. For example, a 1996 amendment to a multilateral maritime liability treaty states:

> The Convention as amended by this Protocol shall apply only to claims arising out of occurrences which take place after the entry into force for each state of this Protocol.

Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, 1976, art. 9(3), 35 I.L.M. 1406, 1435 (1996). Nor has Congress enacted a statute applicable to treaties comparable to the General Savings Statute. 1 U.S.C. § 109. That statute was enacted "in recognition of the principle that, unless the statute is so continued in force by competent authority, its repeal precludes further enforcement." *U.S. v. Chambers*, 291 U.S. 217, 224 (1934). The statute does not apply to treaties, as the court of appeals conceded. *Fujitsu* at 433, App. 14a-15a.

In an area unambiguously the province of the other branches of government, the court of appeals effectively legislated its own resolution of this issue. It declared that principles of international law set forth in the Vienna Convention govern the effectiveness of treaties, and hence the court's own treaty jurisdiction, even though the United States has never ratified that Convention. *Id.* The court of appeals effectively created its own treaty jurisdiction, which encroaches on the powers of the executive and legislative

branches and violates the doctrine of separation of powers. U.S. CONST. art. II, § 2, cl. 2; *In re The AMIABLE ISABELLA*, 19 U.S. 1 (1821).

That is not the proper role of the courts. The courts of the United States have no inherent power to enforce statutes or treaties that have been repealed or amended. That is the function of the General Savings Statute, savings clauses contained in individual treaties, and perhaps in appropriate circumstances the Vienna Convention itself, were it to be ratified by the United States. It has not been ratified, however, and its entry into force is the province of the other two branches of government, not this one. Absent its entry into force for the United States, the court of appeals could not properly rely upon it to create a rule of law that supersedes this Court's consistent rulings. However, even if the Vienna Convention were in effect, as previously noted, it would not apply to the amendments made by The Hague Protocol of 1955.

III. *Certiorari* Should be Granted Because the Decision Below Not Only Applied the Wrong Treaty, But in Doing So, Improperly Applied the Terms of that Treaty.[12]

Because the court of appeals improperly applied the original 1929 Warsaw Convention's express terms, its holding will have commercial implications far beyond the limits of this case. Moreover, its holding creates yet another artful device for avoiding the application of the Warsaw Convention's liability limits, and in that respect is comparable to its decision in *Tseng v. El Al Israel Airlines,*

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[12] In this section, all references unless otherwise noted are to the unamended original 1929 Warsaw Convention, which is what the court of appeals improperly applied. For the Court's convenience, relevant provisions of the original 1929 Warsaw Convention, as they appeared before amendment, are reprinted in the Appendix at 46a-51a. The entire text of the unamended 1929 Warsaw Convention appears in the Lodging, at 6-19.

122 F.3d 99 (2d Cir. 1997) (allowing relief under state law), *rev'd*, 525 U.S. 155 (1999). In *El Al*, this Court overruled the Second Circuit's holding that a claim falling within the purview of the Warsaw Convention could nonetheless be pursued under state law. To preserve the Convention's uniformity, this Court held that the Convention's rules are exclusive in cases involving international air transportation.

Consistent with standard commercial practice, article 6 of the Warsaw Convention makes the consignor (shipper) responsible for making out the air waybill. An air waybill is a contract between the parties for the transportation of goods, as the District Court below acknowledged. App., 24a, Article 11; Lodging, at 9. The consignor, not the carrier, is responsible for the correctness of the particulars relating to the goods. App., 48a, Article 10; Lodging, at 9. The carrier may not accept the goods unless a complete air waybill is first made out. App., 48a, Article 9; Lodging, at 9.

Nearly everyone in the country is now familiar with the procedures for completing FedEx express air waybills. These express air waybill forms do not differ substantially from the industry standard air waybill forms. A FedEx courier will not accept an express or other cargo shipment, whether it be a letter or container, without an air waybill completed by the shipper.

Under the Convention, the consignor has the absolute right to control and dispose of the goods. He may do so "by requiring them to be returned to the airport of departure." App., 49a, Article 12; Lodging, at 9-10. If the consignee rejects the goods, Article 12 specifically authorizes the consignor to assert his right of disposition, including return.[13]

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[13] Article 12 of the original Convention states that if the consignee "declines to accept" the goods, the consignor "shall resume his right of

Against this background, FedEx had no right under the Warsaw Convention to require either consignor or consignee to make out a new air waybill before the consignor could exercise its right of disposition by requiring the return of the goods. In fact, the consignor's right of disposition and FedEx's possession of the goods were governed at all times by the terms of the air waybill that originally authorized that possession.

Thus, the court of appeals had no basis under the Warsaw Convention to impose on FedEx a duty to require a new air waybill before returning the shipment. It fundamentally misconstrued the fact that FedEx had used, for its own internal convenience, the *form* of an air waybill to assist it in effecting and tracking the return. FedEx handles approximately 3.2 million packages daily worldwide and tracks them all electronically. Since the original air waybill, as prepared by Fujitsu, showed only a destination of Austin, FedEx needed a form containing computer codeable tracking data to return it to Fujitsu in Japan. The air waybill form is the most reliable way for FedEx to track a shipment.[14]

That form was neither a contract of carriage nor an air waybill reflecting such a contract, because it is black letter law that there is no such thing as a unilateral contract. 14 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 43.1 (Richard A. Lord ed., 4th ed. 2000). Therefore, contrary to the Court's conclusions below, FedEx as the carrier does not have the unilateral authority to:

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disposition." Neither The Hague Protocol nor Montreal Protocol No. 4 substantively changed this language.

[14] The trial court's conclusion that the consignee (Ross) "engaged" Federal Express to return the merchandise begs the question. It is not whether Ross so engaged FedEx, but rather in what capacity. This question is fully reviewable by this Court on review of the trial court's grant of summary judgment and the court of appeals' disposition of it. App., 23a.

- "create" an air waybill—*Fujitsu* at 430. App., 8a.
- "prepare a complete" air waybill—*Id.* App., 9a.
- "issue a complete" air waybill—*Id.* App., 9a.

Nothing in the Warsaw Convention prohibits the consignee (Ross) from acting as the consignor's agent in exercising the latter's right of disposition and return. Article 14 merely provides:

> The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

In this case, the record before the trial court shows that FedEx confirmed the return instructions with Fujitsu. *Fujitsu* at 426; App., 3a. The inescapable legal reality of this transaction remains, however, that FedEx and Ross, acting on their own behalf, had no right to create a new contract of carriage for these goods. Article 12 of the Convention was not amended by the Hague Protocol. The Court's dicta to the effect that FedEx's second "acceptance" of the goods (for return) in Austin required the creation of a new air waybill (by Ross) was manifestly in conflict with the rules of both the original Convention and the amended Convention. Because Ross had rejected the shipment, the goods simply did not belong to Ross, nor were they at any time under Ross' custody and control, legal or physical. The only right Ross could have had with respect to these goods was to assert on Fujitsu's behalf the latter's right to a return of the goods under Article 12 of the Convention and the original air waybill.

The court of appeals' decision will create chaos in the international air commerce of the United States. The decision would require carriers to demand that persons with no authority to contract for the shipment of goods make out unenforceable air waybills before the consignor can dispose of the goods under the air waybill it executed when it surrendered

the goods to the carrier. This precedent may have unintended consequences for the operation of The Hague Protocol itself, which retains the requirement that an air waybill be made out. Hague, Article XII. Lodging, at 28-29. Thus, well-understood rights and obligations under the Warsaw system will be trampled. Carriers will no longer be able to comply with the consignor's instructions regarding the disposition of the goods, and consignors (shippers) will no longer be able to make efficient arrangements for the return of goods rejected by their consignees. Most importantly, these new rules will apply only to the United States, and will conflict with worldwide custom and practice for air cargo moving under the Convention's rules.

CONCLUSION

For the above reasons, the petition should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 00-7343

FUJITSU LIMITED,
Plaintiff-Appellee,

v.

FEDERAL EXPRESS CORPORATION,
Defendant-Appellant.

November 8, 2000, Argued
April 20, 2001, Decided

JUDGES: BEFORE: STRAUB, SOTOMAYOR, Circuit Judges, and SPATT, District Judge.[1]

SPATT, District Judge:

This case primarily concerns interpretation of the Warsaw Convention treaty governing the liability of international cargo shippers for damage to returned goods while in their possession. We find that the shipment at issue was not a return as defined by Article 12 of the Warsaw Convention and that the carrier's shipment of the goods back to the departure destination at the consignee's direction involved a second acceptance under Article 9, requiring the carrier to create a complete and correct air waybill in order to avail itself of the Convention's limited liability provisions. Because the carrier failed to furnish a complete and correct air waybill upon

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[1] The Honorable Arthur D. Spatt of the United States District Court, Eastern District of New York, sitting by designation.

acceptance of the goods, we affirm the district court's grant of partial summary judgment in favor of the Plaintiff on the carrier's defense of limited liability. We also reject the carrier's argument that the entry into force of the Hague Protocol, which amended the Warsaw Convention, during the pendency of this case (but after the events giving rise to this case) precludes the application of the unamended Warsaw Convention. We find that the district court correctly applied the unamended provisions of the Warsaw Convention. Finally, we affirm the district court's assessment of damages and determination that spoliation sanctions were not warranted.

BACKGROUND

On May 30, 1996, Plaintiff-Appellee Fujitsu Limited ("Fujitsu") shipped a container of silicon wafers from Narita, Japan to Ross Technologies, Inc. ("Ross") in Austin, Texas, using Defendant-Appellant Federal Express ("FedEx") as the cargo carrier. Accompanying the container was an air waybill—a document serving as a bill of lading for goods transported by air, BLACK'S LAW DICTIONARY 70 (6th ed. 1990)—designated as "AWB3691," specifying the consignor and consignee, weight, contents, destination, and route of the container.

On May 31, 1996, the container arrived in Austin and was placed in a bonded cargo cage to await clearance through customs by the Customs Agent for Ross. FedEx does not release goods to their consignees until the goods actually have cleared customs and all import and customs duties have been paid. In this case, Ross' Customs Agent faxed a notification to FedEx that Ross was rejecting the shipment. Pursuant to FedEx's procedures, it contacted Fujitsu and Ross to determine what should be done with the cargo. FedEx policy provided that cargo refused by the consignee would not be moved without written instructions and a guarantee of payment.

According to a June 3, 1996 comment in the FedEx computer tracking system concerning a telephone call, Fujitsu orally instructed FedEx to return the goods to Japan. However, a separate document in the record, on Ross letterhead and dated June 4, 1996, indicates that Ross issued written instructions to FedEx to return the goods to Fujitsu in Japan and informed FedEx that Ross would incur all shipping charges. On July 27, 1996, after the return shipment was completed, FedEx sent an invoice billing Ross $493.00 for the return of the shipment to Japan. The trial court found that "[Ross] decided not to accept the merchandise, and engaged Federal Express to return the merchandise to the consignor in Tokyo at the consignee's expense."

FedEx proceeded to prepare the goods for shipment back by re-labeling and moving the cargo from the customs cage to an outbound staging area. The goods were flown from Austin to the main FedEx hub in Memphis. No air waybill was created in Austin, but in Memphis, FedEx created a new air waybill, designated AWB 3010, listing Ross as the shipper and indicating that the goods were to be shipped from Austin to Narita. AWB 3010 was not completely filled out, but did specifically contain a legend stating "RETURN OF [AWB 3691]" typed across the middle right-hand side of the air waybill form. Fujitsu contends that this legend appeared only on one copy of AWB 3010, not all of them. FedEx asserts that it issued a new air waybill only to accommodate the needs of its computerized package tracking system, not because a new shipping contract was created for the return shipment.

FedEx air waybill numbers also serve as package tracking numbers, which appear on the air waybills in both numerical and barcode form. That tracking number is scanned into the FedEx computer system at various points during transit, in order to track the status of particular shipments. However, when a shipment is returned by FedEx, the computer system

requires that a new tracking number (and, therefore, a new air waybill number) be issued. The computer system does not permit the use of the original air waybill number to track the return of the cargo to the original shipper, and as a result of this technological requirement, FedEx's standard policies for return of international shipments require that new air waybills be issued.

The goods apparently left Austin in good condition, but sat in Memphis for a week before being shipped to Japan. On June 24, 1996, the shipment arrived in Japan. At that time, Fujitsu observed that the outer container was broken and covered with an oily substance which had permeated into some of the interior boxes. Fujitsu opened one of the interior boxes and discovered that the oily substance was also on the exterior of the sealed aluminum bags containing the wafers. Fujitsu did not open any of the bags to determine whether the oily substance had penetrated any of the bags.

Fujitsu reported the damage to FedEx immediately. FedEx eventually acknowledged that the damage occurred to the container while in its possession. At some point in July 1996, upon instructions from its insurance carrier, Fujitsu disposed of the container and wafers. FedEx had not requested an opportunity to inspect the wafers prior to that time.

Fujitsu then brought this action against FedEx grounded in breach of contract and negligence. FedEx raised the defense that, under the Warsaw Convention treaty governing international cargo shipments, it carried the cargo with a proper air waybill and was thus entitled to a limitation on its liability to $9.07 per pound, or a total of about $1,200 for the entire shipment. On November 30, 1999, Judge Hellerstein granted partial summary judgment to Fujitsu, finding that air waybill AWB3010 did not comply with the requirements of the treaty, and that the shipment from Austin to Japan could not be considered to be covered by AWB3691, the initial air waybill. A bench trial on damages was held on February 22 and 23,

2000, and at the close of the trial, Judge Hellerstein found FedEx liable to Fujitsu for damages in the amount of $726,640.

FedEx appeals, claiming (i) that the trial court erred in finding that the return shipment was not covered by the waybill of the originating shipment; (ii) that the court improperly found that an amendment to the Warsaw Convention known as the Hague Protocol was inapplicable; (iii) that the court's findings regarding damages were incorrect; and (iv) that the court erred in denying FedEx's request for a finding of spoliation relating to Fujitsu's destruction of the container and wafers.

DISCUSSION

This Court reviews the District Court's grant of summary judgment de novo. While all factual ambiguities must be resolved in favor of the nonmoving party, "the nonmoving party may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir. 1996). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

A. The Warsaw Convention's limitation of liability

International transportation of persons, baggage, and goods by air are governed by the series of laws, treaties, and individual contracts collectively referred to as the Warsaw Convention "system," deriving that name from the inter-

national agreement commonly referred to as the "Warsaw Convention." Convention for the Unification of Certain Rules relating to International Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat. 3000 (1934), 137 L.N.T.S. 11, reprinted in note following 49 U.S.C.A. § 40105 ("Original Warsaw Convention"); *see El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 160, 142 L. Ed. 2d 576, 119 S. Ct. 662 (1998); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 306 (2d Cir. 2000), petition for cert. filed, 121 S. Ct. 1223, 149 L. Ed. 2d 134, 69 U.S.L.W. 3591 (2001). The Warsaw Convention sets forth uniform rules of liability for loss, damage, or delay of international shipments by air, and embodies a tradeoff between the interests of carriers and shippers. Among its provisions is the rule that cargo carriers are entitled to a limitation of liability based on the weight of the shipment, presently established by the Government at $9.07 per pound. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 255, 80 L. Ed. 2d 273, 104 S. Ct. 1776 (1984); Warsaw Convention art. 22.

The carrier's right to limited liability revolves around the document called an "air waybill," which contains details including the origin, itinerary, and destination of the cargo, and the weight, dimensions, and content of the containers. Specifically, Article 8 of the treaty states that The air waybill shall contain the following particulars:

> (a) the place and date of its execution;
>
> (b) the place of departure and of destination;
>
> (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity. . .;
>
> (d) the name and address of the consignor;
>
> (e) the name and address of the first carrier;
>
> (f) the name and address of the consignee . . .;

(g) the nature of the goods;

(h) the number of packages, the method of packing, and the particular marks or numbers upon them;

(i) the weight, the quantity, the volume, or dimensions of the goods;

. . .

(q) A statement that the transportation is subject to the rules relating to liability established by this convention.

Warsaw Convention art. 8(a)-8(q). According to Article 9 of the treaty, "if the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i) . . . the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability."

Due to the significant benefit that limited liability confers upon cargo carriers, the courts have generally required carriers to comply strictly with the terms of Article 8, and the omission of any required item from the air waybill, with exceptions not applicable here, will result in the loss of limited liability regardless of the commercial significance of the omission. *See Intercargo Ins. Co. v. China Airlines, Ltd.*, 208 F.3d 64, 67 (2d Cir. 2000) (*citing Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1033-34 (2d Cir.1996)); *Tai Ping Ins. Co. v. Northwest Airlines, Inc.*, 94 F.3d 29, 31 (2d Cir. 1996).

It is undisputed that AWB 3691, the first waybill for the shipment from Tokyo to Austin, contained all of the information for that shipment required by Article 8. It is also undisputed that the goods were shipped from Austin to Memphis without the issuance of a new air waybill, and that the air waybill created in Memphis for the return flight to Tokyo did not include the "agreed stopping places" for that return shipment as required by Article 8(c).

FedEx argues that the shipment from Austin to Japan was a return shipment pursuant to Article 12 of the Warsaw Convention, rather than a shipment pursuant to a new contract of carriage. Thus, FedEx contends it was not required to issue an amended or second air waybill for the return, but rather, could rely on AWB 3691, the air waybill issued for the shipment from Japan to Austin. Article 12 grants the consignor of the shipment the right to "dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing . . . or by requiring them to be returned to the airport of departure." Article 12, however, does not address whether the issuance of a second or amended waybill is required when a consignor orders the carrier to return the goods to the airport of departure. We need not resolve that question today, because, as discussed below, FedEx's shipment of the wafers from Austin to Japan was not a return of goods as defined by Article 12 but rather was a separate shipment based on a new contract of carriage.

Article 12 addresses the right of the consignor to have a carrier return the goods. Article 12 is inapplicable here because it was the *consignee*, Ross, not the consignor, Fujitsu, who ordered FedEx to return the goods to the airport of departure. FedEx Service Agent Cherri Field testified in a deposition that once goods in its possession were rejected, FedEx would not move the goods anywhere without written instructions and a guarantee of payment for the return shipping costs. Although FedEx asserts that instructions to return the shipment came from Fujitsu, the record indicates that FedEx treated the return shipment as having originated from Ross. After reviewing FedEx's computer records, Field testified at her deposition that authorization to return the goods came from Ross, not Fujitsu. When FedEx created the second waybill, AWB 3010, it listed Ross, not Fujitsu, as "Shipper." An Air Cargo Manifest produced by FedEx dated

June 18, 1996 also appears to list Ross as the shipper and Fujitsu as the consignee. Further, following the completion of the shipment to Japan, FedEx invoiced Ross, not Fujitsu, for payment of the return shipping charges and payment was made by Ross. Under these circumstances, we find that the trial court correctly determined that the instruction to return the goods to Japan was given by Ross, not Fujitsu.

Because it was Ross, not Fujitsu, that instructed FedEx to return the goods, we find that the shipment of the goods from Austin to Japan was not a return as defined by Article 12, but rather, was a shipment based on a new contract of carriage. Under the provisions of Articles 8 and 9, if FedEx wanted to avail itself of the Warsaw Convention's limited liability provisions for this second, separate shipment, it was required to prepare a complete air waybill when it accepted the goods for shipment from Austin to Japan. As previously discussed, FedEx did not create a second air waybill in Austin, and the air waybill it created en route was incomplete.

Our determination that FedEx was required to issue a complete and correct air waybill in order to gain the Convention's liability limitation for the shipment from Austin to Japan is not affected by FedEx's contention that pursuant to Article 9, limited liability is either gained or lost by the carrier at the time it initially "accepts" the goods for shipment and that there was only one acceptance of the goods in this case. Specifically, FedEx argues that at the time it accepted the goods in Japan for shipment to Austin, it secured the valid waybill AWB 3691, and thus, obtained the protection of the Convention for limited liability with regard to the shipment at issue. FedEx claims that a second acceptance did not occur in Austin because the shipment never left FedEx's custody and control, and thus, could not have been accepted by it from Ross in Austin.

The Warsaw Convention does not define "accepts," and this Court has uncovered no cases interpreting that term in the

context it is used in Article 9. While the notion of "acceptance" does appear to contemplate a receiving of an item by the person making the acceptance, BLACK'S LAW DICTIONARY 12 (6th ed. 1990), nothing in that definition warrants a conclusion that transfer must involve a physical delivery of the property. Here, FedEx entered into a new contract of carriage with Ross on or about June 4, 1996 to ship the goods from Austin back to Narita. In doing so, Ross implicitly assumed authority to direct and control the movement of the goods, and FedEx appears to have accepted the authority of Ross to do so. Under these circumstances, requiring Ross to physically receive and re-present the goods to FedEx to complete the transaction seems needlessly formalistic. By that logic, upon receiving notice that an inbound shipment was arriving, a consignee wishing to redirect the shipment to a third-party would have to travel to the receiving airport to accept the shipment and physically re-tender it to the carrier before the carrier could "accept" it for shipment to the third-party.

Accordingly, we find that the record supports the determination by the trial court that a new contract of carriage was created in Austin and, by extension, a constructive acceptance took place there for purposes of Article 9. Because FedEx failed to obtain a proper air waybill in Austin for the return shipment by Ross, it is not entitled to the limited liability protection of the Warsaw Convention, and the decision of the trial court granting partial summary judgment to Fujitsu on Fed Ex's defense of limited liability is affirmed.

B. The Hague Protocol

FedEx also contends that this case is not governed by the Original Warsaw Convention, but rather by the Warsaw Convention as modified by the international agreement referred to as the "Hague Protocol." See Protocol to Amend the Convention for the Unification of Certain Rules Relating

to International Carriage by Air signed at Warsaw on 12 October 1929, Sept. 28, 1955, 478 U.N.T.S. 371 ("Hague Protocol"). The Hague Protocol, which eliminates some of the formalities required under Articles 8 and 9 of the Original Warsaw Convention, was ratified by Japan on November 8, 1967, but did not enter into force for the United States until another international agreement, Montreal Protocol No. 4, was ratified by the Senate on September 28, 1998 and became effective on March 4, 1999. *See* Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as amended by the Protocol done at the Hague on 28 September 1955, Sept. 25, 1975, Message Transmitting Two Related Protocols, reprinted in S. Exec. Rep. No. 105-20, art. XVII(2); *Chubb*, 214 F.3d at 307 n.4.

As amended by the Hague Protocol, Article 9 deprives carriers of the Convention's limited liability protections only if "cargo is loaded on board the aircraft without an air waybill having been made out" or if "the air waybill does not include the notice required by Article 8, paragraph (c)." The revised version of Article 8(c) requires the carrier to give the consignor notice

> to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to cargo.

Warsaw Convention, art. 8(c) (as amended by the Hague Protocol). FedEx argues that the adoption of the Hague Protocol prior to the decision of the trial court in this case effectively abated the operation of the provisions of the Original Warsaw Convention, or that, in the alternative, it would be able to avail itself of the liability limitations of the

Convention under the terms as amended by the Hague Protocol.

In response, Fujitsu argues that applying the Hague Protocol to facts that took place almost two years before that agreement's entry into force for the United States would conflict with our recent conclusion in Chubb that the Hague Protocol not be given retroactive effect. *See Chubb*, 214 F.3d at 307 n. 4 ("Because the actions giving rise to this suit occurred in 1995, Montreal Protocol No. 4 does not affect this case.") (citing 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 322(1) (1987)).

However, FedEx's principal argument is not that the Hague Protocol should be given retroactive effect, but rather that the Original Warsaw Convention cannot prospectively be enforced following the Hague Protocol's entry into force. This theory is advanced under the common law doctrine of abatement, in which a court is without power to enforce inchoate rights or imperfect obligations under statutes that have been repealed or amended, but not explicitly saved or preserved at the time of repeal or amendment. *See Hertz v. Woodman*, 218 U.S. 205, 217-18, 54 L. Ed. 1001, 30 S. Ct. 621 (1910); *United States v. Mechem*, 509 F.2d 1193, 1194-95 & n.3 (10th Cir. 1975); *see also* 1A SUTHERLAND STAT. CONST. § 23.33, at 424-25 (Norman J. Singer ed., 5th ed. 1993) ("Under common-law principles, all rights, liabilities, penalties, forfeitures and offences which are of purely statutory derivation and unknown to the common law are eliminated by the repeal of the statute which granted them, irrespective of the time of their accrual.").

In order to avoid the potentially disruptive implications of this common law rule, Congress has enacted a general savings statute, 1 U.S.C. § 109, which provides that

> [t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability

> incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109. This provision operates to preserve both civil and criminal statutory liabilities. *See Hertz*, 218 U.S. at 217-18. Whether the earlier statute has been amended or repealed outright is of no consequence; the general savings statute applies in either instance. *See Mechem*, 509 F.2d at 1194-95 & n. 3. Therefore, if the Hague Protocol and Montreal Protocol No. 4 were statutes rather than treaties, the provisions of the Original Warsaw Convention would remain applicable under the general savings statute in 1 U.S.C. § 109 to conduct that took place prior to the Hague Protocol's entry into force for the United States in March 1999. This is so notwithstanding the fact that neither the Hague Protocol nor Montreal Protocol No. 4 contains its own savings provision.

However, FedEx maintains that *treaties* do not fall within the ambit of 1 U.S.C. § 109, arguing that as a statutory exception to a traditional common law rule, the general savings clause must be interpreted narrowly so as not to apply to "treaties" but only to "statutes." *See e.g. Rodgers v. United States*, 158 F.2d 835, 836-37 (6th Cir. 1947) (since predecessor to 1 U.S.C. § 109 "prescribes a rule differing from that of the common law," it cannot be interpreted to include repealed regulations, but "must be strictly construed and limited to repealed statutes"). FedEx argues that because courts cannot enforce any statutory or treaty remedy that is no longer in effect and has not been saved, the remedy under Article 9 of the Original Warsaw Convention, which provides for unlimited liability for clerical omissions in air waybills, was abated and extinguished upon entry into force of the Hague Protocol and Montreal Protocol No. 4 (and the

concurrent repeal of the Original Warsaw Convention) on March 4, 1999.

While we resolved the retroactivity of the Hague Protocol in *Chubb*, this case presents a distinct issue of first impression: whether the rights and liabilities of the Original Warsaw Convention were abated and extinguished by entry into force of the Hague Protocol. As FedEx correctly argues, the answer to that question does not *logically* depend upon whether the Hague Protocol is to be given retroactive effect. Indeed, while FedEx does urge us to overrule our recent holding in Chubb and to give limited retroactive effect to the Hague Protocol to fill the gap it perceives to have been left by the repeal of the Original Warsaw Convention, it would be just as possible for us to fill that gap with a rule derived from the law that governed before the Warsaw Convention. *C f. Ruston Gas Turbines, Inc. v. Pan American World Airways*, 757 F.2d 29, 30 (2d Cir. 1985) (holding that "deregulation of certain common carriers" following enactment of the Airline Deregulation Act of 1978, 92 Stat. 1705, "returns us to the common law"). Fujitsu's mere recitation of our non-retroactivity holding in Chubb, therefore, is not sufficient to refute FedEx's abatement argument.

However, FedEx's enticing argument suffers a crucial flaw: the issue of whether the provisions of a treaty have been abated or extinguished following the entry into force of a subsequent treaty is governed by neither the common law doctrine of abatement nor the general savings statute codified at 1 U.S.C. § 109. Rather, when resolving that question, we apply the rules of customary international law enunciated in the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"). As we did in Chubb, we rely upon the Vienna Convention here "as an authoritative guide to the customary international law of treaties." *Chubb*, 214 F.3d at 309. Because the United States "recognizes the Vienna Convention as a codification of

customary international law," it "considers the Vienna Convention 'in dealing with day-to-day treaty problems'" and acknowledges the Vienna Convention as, in large part, "the authoritative guide to current treaty law and practice.'" *Id.* at 308; *see* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, intro. note, at 144-45 (discussing Vienna Convention's codification of the customary international law governing international agreements and the acceptance of the Convention by the United States).

The ongoing effect of treaties under customary international law is not governed by the same rule governing the ongoing effect of statutes under the common law. Rather, customary international law, as recited by the Vienna Convention in some detail, supplies its own distinct set of rules concerning the amendment, modification, suspension, and termination of international agreements. *See Vienna* Convention arts. 39-41, 54-64. Unlike the common law relating to statutes, customary international law contains no baseline presumption that the provisions of a new agreement automatically abate and extinguish any prior treaty relating to the same subject matter. To the contrary, customary international law governing the effect of treaties furnishes almost the opposite baseline norm, *pacta sunt servanda*, which provides that a treaty in force is "binding upon the parties to it and must be performed by them in good faith" unless the treaty has been affirmatively terminated or suspended. Vienna Convention art. 26; see 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 & cmt. a, at 190 (stating that the doctrine of *pacta sunt servanda*, though subject to international law rules concerning the validity and termination of agreements, "lies at the core of the law of international agreements and is perhaps the most important principle of international law"); *see also* Vienna Convention art. 27 ("A party may not invoke the

provisions of its internal law as justification for its failure to perform a treaty.").

This contrary presumption is particularly relevant with respect to multilateral treaties such as the Warsaw Convention, because such treaties frequently are modified-but not thereby terminated—by

> amending agreements binding only those parties that were willing to accept the amendment while leaving the original or earlier amended agreement still in force to govern relations between the other parties, as well as between the other parties and the amending group. As a result, it has become fairly common for several versions of a multilateral treaty to exist simultaneously, with different sets of provisions operating between various groups of states.

Maria Frankowska, The Vienna Convention on the Law of Treaties Before United States Courts, 28 VA. J. INT'L L. 281, 361-62 (1988).

Under Article 59 of the Vienna Convention, an international agreement is deemed to have been "terminated" by conclusion of a later treaty only if all of the parties to the first agreement conclude a later agreement relating to the same subject matter *and* either

> (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; *or*
>
> (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

Vienna Convention art. 59. In this case, while the Hague Protocol and Original Warsaw Convention clearly relate to the same subject matter, it is equally clear that the Original Warsaw Convention was not terminated by enactment of the

Hague Protocol. Not only were all of the parties to the Original Warsaw Convention not parties to the Hague Protocol, but we have already concluded that (a) the parties to the Hague Protocol did not intend for that treaty to govern conduct taking place before entry into force of that agreement, *see Chubb*, 214 F.3d at 307 n. 4; 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 322(1); and (b) the two treaties are not "so far incompatible" that they "are not capable of being applied at the same time." Vienna Convention art. 59(1)(b). To the fullest extent possible, treaty language is to be interpreted so as to avoid inconsistency. *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 332 *cmt. f*, at 211. By giving effect to the Original Warsaw Convention for conduct taking place before entry into force of the Hague Protocol and effect to the Hague Protocol for conduct taking place after entry into force of that agreement, we easily avoid any possible inconsistency between the two agreements.

It is therefore not necessary for us to consider whether FedEx still would be able to invoke the liability limitation under the terms of the Amended Warsaw Convention, for notwithstanding the entry into force of the Hague Protocol in March 1999, we retain the authority to enforce the terms of the Original Warsaw Convention for conduct taking place prior to that date. We do, however, note our view that FedEx would not prevail even under the terms of the Amended Warsaw Convention. Upon its acceptance of the goods for shipment in Austin, FedEx permitted those goods to be loaded onto the aircraft for shipment without a new air waybill, apparently in violation of the requirements of even the amended version of Article 9. It was only upon arrival of the goods for shipment in Memphis that a new air waybill was generated for the return shipment to Narita.

Accordingly, we find that the entry into effect of the Hague Protocol during the pendency of this case did not preclude the

application of the Original Warsaw Convention to the facts at issue here.

C. Damages

With regard to provable damages, FedEx argues that Fujitsu produced no evidence showing that the wafers, which had been sealed inside impermeable aluminum bags, had been damaged in any way. It further contends that the trial court incorrectly determined the market value of the wafers to be the equivalent of the invoice price, when the testimony established that there was no real market for the wafers. Finally, FedEx challenges the court's findings on the mitigation of damages by Fujitsu.

Fed R. Civ. P. 52(a) states that a trial court's findings of fact shall not be set aside unless they are clearly erroneous, and the appellate court must give due regard to the trial judge's opportunity to observe the witnesses as to their credibility.

While FedEx is correct that the record contains no evidence that the wafers themselves were damaged, there was sufficient evidence adduced to support a finding by the court that the shipment was a total loss because the residue on the outer packaging made it impossible to access the wafers. According to the testimony, the bags containing the wafers could only be opened in a specially designed and maintained "clean room" so as to prevent dust contamination. However, because the bags themselves were coated with the oily residue, they could not be brought into a clean room for inspection, as the residue itself would contaminate the clean room. Consequently, the trial court found that even if the wafers were undamaged, Fujitsu was unable to extract them from the bags in an operable condition. This Court can discern no difference between damage rendering the wafers inoperable and damage that prevents otherwise operable wafers from being used or salvaged.

While there was competing testimony on the issue of whether cleaning the residue from the bags in order to permit inspection and salvage of the wafers inside was economically reasonable, the trial court resolved this conflict by expressly choosing to credit the testimony of Fujitsu's expert. Specifically, the trial court held that "on issues of credibility and the importance of his testimony, I believe that Mr. Abend's [Fujitsu's expert] testimony is the more credible [than Mr. Chevrier, FedEx's expert] and it should be accepted." Credibility determinations are the province of the trial judge, and should not be overruled on appeal unless clearly erroneous. *Tenenbaum v. Williams*, 193 F.3d 581, 606 (2d Cir. 1998); *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 634 (2d Cir.1996). This factual determination by the trial court will stand.

In addition, with regard to mitigation, the trial court's factual finding that efforts to salvage the wafers would have been prohibitively expensive also suffices to reject FedEx's argument that Fujitsu failed to mitigate its damages.

Finally, the appropriate measure of damages to cargo is the difference between the market value of the shipment at its destination and the value of the shipment as damaged. *Gulf, C. & S.F. Ry. Co. v. Texas Packing Co.*, 244 U.S. 31, 37, 61 L. Ed. 970, 37 S. Ct. 487 (1917); *Seguros Banvenez, S.A. v. S/S Oliver Drescher*, 761 F.2d 855, 860-61 (2d Cir. 1985). Here, the trial court found that the market value of the wafers was $ 726,400, and the value of the damaged shipment was zero. While FedEx argues that the wafers, once rejected by Ross, had no value to any other potential buyer because they had been custom-made for Ross, this Court agrees with the trial court's calculation of damages. The record reflects that Ross placed an order for a similar shipment of wafers after the events at issue here. Accordingly, the trial court's assessment of damages is affirmed.

D. Spoliation

FedEx sought a sanction against Fujitsu for spoliation based on the destruction of the wafers in July 1996. The record reveals that Fujitsu informed FedEx of the damage to the container immediately upon its arrival in Japan on June 24, 1996. According to the parties, on an undetermined date in July, after receiving instructions from its insurance company, Fujitsu destroyed the container and wafers. FedEx admits that it never contacted Fujitsu to seek an opportunity to inspect the container or otherwise request that the container or wafers should be retained.

The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation. *See Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). Once a court has concluded that a party was under an obligation to preserve the evidence that it destroyed, it must then consider whether the evidence was intentionally destroyed, and the likely contents of that evidence. *See id.* at 127. The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, *see West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999), and is assessed on a case-by-case basis. *See United States v. Grammatikos*, 633 F.2d 1013, 1019-20 (2d Cir. 1980). We have recently observed that "[our] case-by-case approach to the failure to produce relevant evidence seems to be working." *Reilly v. Natwest Mkts. Group, Inc.*, 181 F.3d 253, 267 (2d Cir. 1999).

In this case, the trial court found that FedEx had failed to demonstrate that Fujitsu's action was an intentional attempt to destroy evidence. *In Thiele v. Oddy's Auto and Marine, Inc.*, 906 F. Supp. 158, 160 (W.D.N.Y. 1995), the court sanctioned the plaintiff for destroying an allegedly defective boat before the third-party defendant could inspect it, but denied a spoliation sanction requested by the main defendant who had

been given the opportunity to inspect the boat prior to its destruction. *See also Indemnity Ins. Co. of N. Am. v. Liebert Corp.*, 1998 U.S. Dist. LEXIS 9475, 96 Civ. 6675 (DC), 1998 WL 363834 (S.D.N.Y. June 29, 1998) (denying spoliation sanction where defendant had an opportunity to inspect evidence prior to its destruction). It is undisputed that FedEx did not request to inspect the damaged shipping container after Fujitsu notified it of the damage, nor at any time other than prior to it making the summary judgment motion in August 1999. Accordingly, the trial court did not abuse its discretion in finding that, under the particular facts of this case, no sanction for spoliation was required.

CONCLUSION

We hold that (1) because the return shipment from Austin to Narita constituted a new shipment that was constructively accepted by FedEx without the tender of a valid waybill, FedEx is not entitled to avail itself of the limitation of liability contained in the Original Warsaw Convention; (2) the entry into effect of the Hague Protocol does not abate the effect of the Original Warsaw Convention on events occurring prior to March 4, 1999; (3) the trial court was not clearly erroneous in finding that Fujitsu suffered damages in the amount of $726,400; and (4) the trial court did not abuse its discretionin refusing to sanction Fujitsu for spoliation.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 5451 (AKH)

FUJITSU LIMITED,

Plaintiff,

-against-

FEDERAL EXPRESS CORPORATION,

Defendants.

November 30, 1999, Decided
December 2, 1999, Filed

ORDER and MEMORANDUM

JUDGES: ALVIN K. HELLERSTEIN, United States District Judge.

ALVIN K. HELLERSTEIN, U.S.D.J.:

The issue put to me is whether an air carrier, asked to return rejected merchandise and performing the air carriage without a duly issued airway bill, is entitled to the damage limitation of the Warsaw Convention, ("the Convention"), for goods damaged during the air carriage. The issue was put to me for decision by Defendant Federal Express Corporation's motion for partial summary judgment and Plaintiff Fujitsu Limited's cross-motion for partial summary judgment. I hold that the air carrier is not entitled to the damage limitation and must respond to the plaintiff for the diminished value of the merchandise.

Plaintiff Fujitsu Limited, as consignor, engaged defendant Federal Express, through an affiliate, to transport by air a shipment of silicon wafers from Tokyo, Japan, to the consignee, Ross Technology, in Austin, Texas. Fujitsu caused airway bill 023-3665-3691 to be completed and executed, conforming to the requirements of the Warsaw Convention, modified by the Hague Protocol, 49 U.S.C. § 40105.

The consignee decided not to accept the merchandise, and engaged Federal Express to return the merchandise to the consignor in Tokyo at the consignee's expense. No new airway bill was created. Federal Express brought the merchandise back to its terminal in Memphis, Tennessee, for reshipment back to Japan. The silicon wafers were accidentally damaged in Memphis, causing approximately a $900,000 loss.

In Memphis, Federal Express created an airway bill, number 023-3682-3010, claiming that it did so to facilitate tracking of the merchandise. The airway bill did not provide all the details specified in the Warsaw Convention. It did not, for example, specify the place and date of its execution or the agreed stopping places of the shipment, as required by Articles 8(a) and 8(c) of the Convention.

Article 5 of the Convention provides for a consignor to complete an airway bill, and to require a carrier to transport merchandise covered by such airway bill. Articles 6 through 8 specify the details that are to be provided. Article 9 provides that if an air carrier transports merchandise covered by a conforming airway bill, the carrier is entitled to a limited liability of $9.07 per pound of transported merchandise; if there is no airway bill, or if the airway bill omits required details, a contract of carriage may still exist, but the carrier is not entitled to the limited liability provided by the Convention.

The question at issue is whether the return of rejected merchandise is covered by the same airway bill that covered the original passage. Counsel represent to the court that no case treats this question, and that the issue is of first impression. I hold that the original airway bill does not cover the return of rejected merchandise.

An airway bill, like all contracts, expresses an agreement of the parties. *In re Alleged Food Poisoning Incident, March, 1984*, 770 F.2d 3 (2d Cir. 1985). The consignor and the air carrier agree, and set out in the airway bill, "the place and date of its execution," "the place of departure and of destination," and "the agreed stopping places, " among other things. 49 U.S.C. § 40105, Art. 8. Airway bill "3691" set out Tokyo, Japan as "the place and date of its [the airway bill's] execution" and "the place of departure," and set out Austin, Texas as "the place of . . . Destination." Nothing was said with respect to the possibility of return of merchandise.

Federal Express represents that the consignee, upon rejecting the shipment, engaged Federal Express to return the merchandise, at the consignee's expense. Thus, the consignee became the consignor of the return carriage. But no new airway bill was created. Although Federal Express had the right to insist that the consignor create a new airway bill, *Id.*, Art. 5, Federal Express failed to do so. Thus, a contract of carriage was effected between Federal Express and the consignee, but Federal Express failed to create the mechanism giving it limited liability under the Convention. Federal Express' late creation of an airway bill did not conform to the Convention and was ineffective to give it limited liability. Without conforming provisions and procedures, the limitations of liability provided by Article 9 of the Convention for an air carrier cannot be invoked. *Federal Ins. Co. v. Yusen Air & Sea Serv.*, No. 97 Civ. 3830, 1998 WL 4779897 at *2 (S.D.N.Y. Aug. 14 1998) (Article 9 precludes reliance on Article 22, limiting liability, if party failed to comply with particulars of Article 8).

At oral argument, I commented that custom and usage might be relevant to show that a return carriage may be covered by the original airway bill. It appears, however, that custom and usage may not modify a clear provision of a contract, *Hunt v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989), and airway bill "3691" is clear and unambiguous as to the places of departure and destination of the goods in question.

Accordingly, I grant Fujitsu's cross-motion.

The parties shall attend a conference on December 16, 1999, at 4:00 p.m., to discuss such proceedings as may be necessary finally to resolve this case.

SO ORDERED.

Dated: New York, New York

November 30, 1999

ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 5451 (AKH)

FUHITSU LIMITED

Plaintiff,

v.

FEDERAL EXPRESS CORPORATION

Defendant.

ALVIN K. HELLERSTEIN, USDJ.:

On November 30, 1999, I issued an opinion in this case holding that Federal Express Corporation was not entitled to the damage limitation of the Warsaw convention and ordering further proceedings to resolve this case. The parties appeared for a bench trial on February 22 and 23, 2000 to determine the extent of Defendant's liability. For the reasons stated on the record, I rule that Defendant Federal Express Corporation is liable to Plaintiff for $726,640 plus interest from the date of breach, June 25, 1996, until the date of judgment, February 23, 2000, and from the date of judgment forward, as calculated pursuant to 28 U.S.C. §1961.

SO ORDERED.

Dated: New York, New York
February 24, 2000

ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX D

EXCERPT FROM SENATE COMMITTEE ON FOREIGN RELATING, S. EXEC. REP. 105-20 AT 21-32:

THE PROVISIONS OF THE REVISED WARSAW CONVENTION APPLICABLE TO THE UNITED STATES IN THE EVENT OF RATIFICATION OF MONTREAL PROTOCOL NO. 4[1]

CHAPTER I. SCOPE—DEFINITIONS

Article 1

1. This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise. (W-Art. 1)

2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention. (H-Art. I)

3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it

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[1] Margin notes give the source of the provision (W = Warsaw Convention; H=The Hague Protocol; M4 = Montreal Protocol No. 4).

does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State. (H-Art. I)

Article 2

1. This Convention shall apply to transportation performed by the State or by legal entities constituted under public law provided it falls within the conditions laid down in Article 1. (W-Art. 2)

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations. (M4-Art. II)

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items. (M4-Art. II)

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I.—PASSENGER TICKET.

Article 3

1. In respect of the carriage of passengers a ticket shall be delivered containing:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

(c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention

governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

2. The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22. (H-Art. III)

SECTION II.—BAGGAGE CHECK

Article 4

1. In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

(c) a notice to the effect that if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage.

2. The baggage check shall constitute *prima facie* evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1(c)) does not include the notice required by paragraph 1(c) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph 2. (H-Art. IV)

SECTION III.— DOCUMENTATION RELATING TO CARGO

Article 5

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. Any other means which would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

3. The impossibility of using, at points of transit and destination, the other means which would preserve the record of the carriage referred to in paragraph 2 of this Article does not entitle the carrier to refuse to accept the cargo for carriage. (M4-Art. III)

Article 6

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor. (M4-Art. III)

Article 7

When there is more than one package:

a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

b) the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of Article 5 are used. (M4- Art. III)

Article 8

The air waybill and the receipt for the cargo shall contain:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

c) an indication of the weight of the consignment. (M4-Art. III)

Article 9

Non-compliance with the provisions of Articles 5 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability. (M4-Art. III)

Article 10

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by him or on his behalf in the air waybill or furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 5.

2. The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on his behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on his behalf in the receipt for the cargo or in the record preserved by the other means referred to in paragraph 2 of Article 5. (M4-Art. III)

Article 11

1. The air waybill or the receipt for the cargo is *prima facie* evidence of the conclusion of the contract, of the acceptance

of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the receipt for the cargo relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo. (M4-Art. III)

Article 12

1. Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

3. If the carrier obeys the orders of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the receipt for the cargo delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the receipt for the cargo.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition. (M4-Art. III)

Article 13

1. Except when the consignor has exercised his right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage. (M4-Art. III)

Article 14

The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract of carriage. (M4-Art. III)

Article 15

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the receipt for the cargo. (M4-Art. III)

Article 16

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, his servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents. (M4-Art. III)

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. (W-Art. 17)

Article 18

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.

2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air.

3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:

a) inherent defect, quality or vice of that cargo;

b) defective packing of that cargo performed by a person other than the carrier or his servants or agents;

c) an act of war or an armed conflict;

d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. (M4-Art. IV)

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods. (W-Art. 19)

Article 20

In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures. (M4-Art. V)

Article 21

1. In the carriage of passengers and baggage, if the carrier proves that the damage was caused by or contributed to by the negligence of the person suffering the damage the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

2. In the carriage of cargo, if the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. (M4-Art. VI)

Article 22

1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability. (H-Art. XI)

3. a) In the carriage of registered baggage, the liability of the carrier is limited to the sum of two hundred and fifty francs per kilogram, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum, not exceeding the declared sum, unless he proves that the sum is greater than the passenger's or consignor's actual interest in delivery at destination. (H-Art. XI; M4-Art. VII)

b) In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the consignor's actual interest in delivery at destination. (M4-Art. VII)

c) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability. (H-Art. XI)

3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand francs per passenger. (H-Art. XI)

4. The limits prescribed in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage,

or before the commencement of the action, if that is later. (H-Art. XI)

5. The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment. (H-Art. XI)

6. The sums mentioned in terms of the Special Drawing Right in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party.

Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 2 b) of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of two hundred and fifty monetary units per kilogramme. This monetary unit corresponds to sixty-five and a half milli-

grammes of gold of millesimal fineness nine hundred. This sum may be converted into the national currency concerned in round figures. The conversion of this sum into national currency shall be made according to the law of the State concerned. (M4-Art. VII)

Article 23

1. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention. (W-Art. 23, designated as para. 1 by H-Art. XII)

2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried. (H-Art. XII)

Article 24

1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability. (M4-Art. VIII)

Article 25

In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment. (M4-Art. IX)

Article 25A

1. If in action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22. (H-Art. XIV)

2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits. (H-Art. XIV)

3. In the carriage of passengers and baggage, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result. (M4-Art. X)

Article 26

1. Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation. (W-Art. 26)

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of

the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have [has] been placed at his disposal. (H-Art. XV)

3. Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid. (W-Art. 26)

4. Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part. (W-Art. 26)

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate. (W-Art. 27)

Article 28

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

2. Questions of procedure shall be governed by the law of the court to which the case is submitted. (W-Art. 28)

Article 29

1. The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

2. The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted. (W-Art. 29)

Article 30

1. In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

2. In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee. (W-Art. 30)

Article 30A

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person. (M4-Art. XI)

CHAPTER IV.
PROVISIONS RELATING TO COMBINED TRANSPORTATION

Article 31

1. In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of Article 1.

2. Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air. (W-Art. 31)

CHAPTER V. GENERAL AND FINAL PROVISIONS

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28. (W-Art. 32)

Article 33

Except as provided in paragraph 3 of Article 5, nothing in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention. (M4-Art. XII)

Article 34

The provisions of Articles 3 to 8 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business. (M4-Art. XIII)

Article 35

The expression "days" when used in this convention means current days, not working days. (W-Art. 35)

Articles 36 to 40.[2]

Article 40A

1. In Article 37, paragraph 2 and Article 40, paragraph 1, the expression High Contracting Party shall mean State. In all other cases, the expression High Contracting Party shall mean a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.

2. For the purposes of the Convention the word territory means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible. (H-Art. XVII)

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference. (W-Art. 41)

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[2] Articles 36 to 40 govern participation in and withdrawal from the Convention. Montreal Protocol No. 4 would largely supersede these clauses for the United States and they are therefore omitted here.

APPENDIX E

RELEVANT PROVISIONS OF ORIGINAL WARSAW CONVENTION

Section III - Air Waybill

Article 5

1. Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill"; every consignor has the right to require the carrier to accept this document.

2. The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of Article 9, be none the less governed by the rules of this Convention.

Article 6

1. The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

2. The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

3. The carrier shall sign on acceptance of the goods.

4. The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

5. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

The air waybill shall contain the following particulars:

a. The place and date of its execution;
b. The place of departure and of destination;
c. The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;
d. The name and address of the consignor;
e. The name and address of the first carrier;
f. The name and address of the consignee, if the case so requires;
g. The nature of the goods;
h. The number of packages, the method of packing and the particular marks or numbers upon them;
i. The weight, the quantity, the volume, or dimensions of the goods;
j. The apparent condition of the goods and of the packing;
k. The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;
l. If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;
m. The amount of the value declared in accordance with Article 22 (2);
n. The number of parts of the air waybill;

o. The documents handed to the carrier to accompany the air waybill;

p. The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

q. A statement that the transportation is subject to the rules relating to liability established by this Convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in Article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.

Article 10

1. The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

2. The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Article 11

1. The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

2. The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked

by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

1. Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

3. If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the airway bill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air airway bill.

4. The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with Article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

1. Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over

to him the air waybill and to deliver the goods to him, on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.

2. Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.

3. If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

Article 14

The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

1. Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the carrier or from the consignee.

2. The provisions of Articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article 16

1. The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence,

insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,

Petitioner,

v.

FUJITSU LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Fujitsu Limited, has no parent company and is a publicly traded stock corporation, shares of which are traded on the Tokyo Exchange.

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COUNTER STATEMENT OF THE CASE

FedEx has filed its petition for Certiorari in its continuing attempt to avail itself of the limitation of liability of the Convention for the Unification of Certain Rules Relating to International Transportation by Air done at Warsaw, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, T.S. No. 876 (1934), reprinted at 49 U.S.C. § 40105 note (1994), known and commonly referred to as the *Warsaw Convention*, for the damage sustained to goods (silicon wafers) during their transportation by air from Austin, Texas to Tokyo, Japan.

The transportation took place in May of 1996. At that time, both the United States and Japan were high contracting parties to the Warsaw Convention.

At that time, Japan was also a signatory to a 1955 amendment to that Convention known as *The Hague Protocol of 1955*. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at the Hague, Sept. 28, 1955, 478 U.N.T.S. 371. By ratifying *Montreal Protocol No. 4 of 1975*, Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as amended by the Protocol done at The Hague on September 28, 1955, Sept. 25, 1975, TIAS No. ____, reprinted in, ICAO Doc. No. 9148 (1975), the United States also acceded to the Hague Protocol.

No separate airway bill was issued for the transportation by air of the shipment from Austin to Tokyo until the shipment had arrived at the FedEx distribution center in Memphis.

FedEx does not dispute that it carried these goods by air from Austin, Texas to Tokyo, Japan and that this was "international transportation" between two "high contracting parties."

FedEx contends that it could avail itself of the limitation if either: (1) the Courts below characterized the shipment as a "return" or (2) if the Hague Protocol rather than the Warsaw Convention is the controlling law.

The petition should be denied since the result does not change even if FedEx prevails on either or both of these points.

REASONS FOR DENYING THE WRIT

I. Certiorari should be denied because the outcome of this case will not change even if this Court were to accept either or both of petitioner's arguments that the Hague Protocol rather than the Warsaw Convention is the controlling law applicable to this shipment or that the shipment was a "return".

Both the Warsaw Convention and The Hague Protocol provide that for the air carrier to avail itself of the limitation of liability under Article 22(2) in regard to the carriage of goods by air, the shipment must have had an air waybill meeting certain minimum requirements. No "exception" in this regard is found anywhere in either treaty as regards "types" of shipments, such as collect shipments, return shipments or fully prepaid shipments. Nevertheless FedEx asks this Court to engrave on the treaties at least one such exception, i.e., "the return."

With apologies to Gertrude Stein the fact is that under either treaty, "a return is always a carriage of goods by air but every carriage of goods by air is not always a return."

Specifically, in regard to the facts of this case, the applicable provision of Warsaw is Article 9 that provides:

> If the carrier accepts goods without an airway bill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

In *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122 (1989), we are instructed that any interpretation of the Convention must begin with the literal language of the treaty. *See Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 9 (2d Cir. 1990).

The "literal language" of Article 9 contains no exceptions. Thus, whether the shipment is characterized as a return or otherwise, absent a timely air waybill with the required particulars, the air carrier, which accepts a shipment to travel between two high contracting parties to Warsaw, can not avail itself of the limitation. Here, FedEx accepted the goods for transportation from Austin to Tokyo upon receipt of written instructions and a written guarantee of payment. There simply was no air waybill.

For those countries adhering to The Hague Protocol, Article VII of the Protocol deleted and replaced the Warsaw language of Article 9 with the following language:

> If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph (c), the carrier shall not be entitled to avail himself of the provisions of Article 22, paragraph 2.

The "literal language" of the Hague Protocol contains no exceptions. There is no question that the air waybill for the carriage of these goods by air from Austin to Tokyo was not created until the shipment had "with the consent of the carrier," been loaded, left Austin and arrived in Memphis.

Although it is clear that the Second Circuit correctly applied the terms of the Warsaw Convention to this case, it even went on to state in its opinion that:

> We do, however, note our view that FedEx would not prevail even under the terms of the Amended Warsaw Convention. Upon its acceptance of the goods for shipment in Austin, FedEx permitted those goods to be loaded onto the aircraft for shipment without a new air waybill, apparently in violation of the requirements of even the amended version of Article 9.

Fujitsu Limited v. Federal Express Corporation, 247 F.3d 423, 434 (2d Cir. 2000).

Thus, whether this action is controlled by Warsaw, as found by the Courts below, or if it is controlled by the Hague Protocol, as contended by FedEx, the result will be the same. FedEx simply cannot avail itself of the limitation of liability because no air waybill was prepared before the goods left Austin.

FedEx also suggests that this Court should make a finding *de novo* that the shipment was a "return" for which no air waybill was required. Even assuming that this position of FedEx is accepted, the result is the same for the reasons stated. **The "literal language" of both Warsaw and the Hague Protocol contains no such exception.**

Finally FedEx contends that no air waybill for "a return" is required because of Article 12(1) of Warsaw. There is no such exception in Article 12 or anywhere else in the Convention and, as Petitioner notes, this Article was not amended by Hague.

Under Article 12(1), at any time before delivery to the consignee, the consignor can call upon the carrier to make another disposition of the shipment. There are only two caveats; the consignor must not "prejudice" the carrier *and* he (the consignor) must "repay any expenses."

Neither of these caveats either conflicts with nor obviates the requirement of Article 9. The position is further supported by Article 33:

> Nothing contained in this Convention shall prevent the carrier * * * from refusing to enter into any contract of transportation * * *.

Indeed, in presenting Article 12 to the Convention Delegates, Henry De Vos, the Reporter of the International Technical Committee of Aeronautical Legal Exports, wrote:

> However it seemed opportune to remind one at the end of the Convention that all these Provisions left entirely intact the right of all carriers to refuse to accept any carriage whatsoever.[1]

Thus, just as FedEx required both written instructions and a guarantee of payment before it would move the shipment, *if FedEx wanted to avail itself of the limitation of liability under Article 22*, it could have also required a correct air waybill. FedEx also could have refused to move the goods until it had received, or, as it eventually did itself, prepared the air waybill.

II. Certiorari should be denied because there has never been an "abatement" of Warsaw.

Petitioner argues at great length that Warsaw was "abated" before trial by reason of the adoption of Montreal Protocol 4 by which the United States acceded to the Hague Protocol. This position is logically and legally incorrect.

At no point does petitioner put any limitations on its "abatement" theory. Logically, if Warsaw was "abated", does that mean that the United States is no longer a "High Contracting Party" to Warsaw? Are countries that have only signed Warsaw, but not Hague, and which were in a

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1. *Second International Conference on Private Aeronautical Law Minutes, Warsaw, 1929,* (translated by Horner and Legrez), Rothman, 1975 at page 251

treaty relationship with the United States now no longer in such a treaty relationship? Approximately 135 countries ratified or are adherents to the Warsaw Convention. Approximately 50 countries had ratified or adhered to Hague prior to Montreal Protocol 4. Approximately eight countries have signed Hague but not Warsaw. Approximately 51 countries have signed Montreal Protocol 4. There are countries included which have ratified more than one of the documents.

Until March 4, 1999 the United States was in a treaty relationship with each of some 134 other countries. The petitioner now would assert that those "relationships" were "abated." The alternative would be that the United States is now only a "High Contracting Party" to and in treaty relationship only with those 51 countries which themselves have acceded to Hague as amended by Montreal Protocol 4. The bald assertion that Warsaw was "abated" is simply illogical.

Warsaw, the Hague Protocol, and Montreal Protocol 4 all regulate the private rights of air carriers and shippers but only as regards shipments which are between countries which are signatories. Neither the original convention nor either of the amending protocols regulate or affect the relations between any of the signatory nations. There simply is nothing in Hague or Montreal Protocol 4 to suggest that this is the proper result intended by either of these amendments.

Petitioner relies on *Hertz v. Woodman*, 218 U.S. 205 (1910) and *The Schooner Peggy*, 5 U.S. 103 (1801), both of which are inapposite.

In *Hertz*, *supra*, the issue was whether the repeal of an estate tax, passed to fund the Spanish-American War, was prospective or retroactive. No treaty was involved. The Court ultimately held that even though the tax was repealed before the due date, it was fixed and payable.

In *The Schooner Peggy*, the issue was whether a treaty ending a war and containing a provision requiring the return of a prize that had not been "definitively condemned" nullified a proceeding pending on appeal. As Mr. Chief Justice Marshall concluded,

> It is true, that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.

The Schooner Peggy, *supra*, at page 110.

Since whether or not FedEx is able to avail itself of a limitation of liability in this case does not appear to be of "great national concern," petitioner's principal citation seems to stand for just the opposite proposition than which it was cited.

As suggested by the cited language from the opinion in *The Schooner Peggy*, supra, the appropriate legal authority on this issue in regards to treaties and in accord with *The Schooner Peggy* is *Haver v. Yaker*, 76 U.S. 32 (1869),

where this court succinctly addressed the issue of the retroactivity of a treaty. Two principals were enunciated:

> 1. * * * as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date.
>
> 2. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it effects them, it is not considered as concluded until there is an exchange of ratifications, * * * *

Haver, supra, at page 34.

The issue here only concerns the private right of FedEx to avail itself of the limitation of liability. Thus, where as here, the Hague Protocol through Montreal Protocol 4 expressly did not "come into force" until well after the shipment in question, the amendments to the treaty are given no retroactive effect as to private rights. *See, e.g.*, 87 C.J.S., Sec. 14, cited in *United States v. City of Kodiak*, 132 F. Supp. 574 (D. Alaska 1955).

As demonstrated, petitioner's theory of "abatement" has no foundation in logic or law.

CONCLUSION

Based on the foregoing, Petitioner has set forth no basis for this court to grant Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

FUJITSU LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

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REPLY OF PETITIONER TO BRIEF IN OPPOSITION

Fujitsu's brief in opposition ignores the Second Circuit's core holdings in the decision below. If this Court does not address those holdings, they will fundamentally disturb the operation of the Warsaw Convention.[1] The uniform worldwide operation of this treaty is important to the U.S. economy.

Fujitsu's brief relies exclusively on arguments that are tangential to the Second Circuit's decision, and those arguments confirm that the Second Circuit's decision below will contribute to confusion among shippers, insurers, and lower courts with respect to the operation of the Warsaw Convention's cargo rules. For example, Fujitsu asserts that the Convention requires the carrier to complete a new air waybill to return a shipper's goods to the shipper under either the original 1929 Warsaw Convention or The Hague Protocol.[2] Brief in Opposition at 2-3.

Fujitsu's candid analysis of the decision underscores its profound implications. Under the Second Circuit's decision, the original contract of carriage will not govern a return shipment, notwithstanding the provisions of both the air

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air done at Warsaw, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 40105 note (1994) (the "Convention"). For the Court's convenience, the text of the Warsaw Convention, including amendments, as it is currently in effect for the United States appears in Appendix D to FedEx's Petition for a Writ of Certiorari. The text of the original 1929 Convention appears in the Lodging Material at 1-19.

[2] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at The Hague, Sept. 28, 1955, 478 U.N.T.S. 371 ("The Hague Protocol"). The text of the Convention as amended by The Hague Protocol appears in the Lodging Material at 20-36.

waybill and the Warsaw Convention. Instead, according to Fujitsu, a shipper's request for a return of the goods triggers the need for an entirely new contract of carriage, subject *ab initio* to all of the Convention's requirements for a new shipment.

This leads to the manifestly absurd result—which Fujitsu concedes in its Brief in Opposition at 5-6—that under Article 33 of the Convention the carrier can exercise its right to refuse to enter into a contract to return the cargo. This leaves the carrier with the right to retain possession of goods that do not belong to it. This result contradicts settled expectations relating to the rights of shippers and carriers, and obviates the shipper/consignor's right to dispose of the goods under Article 12 of the Convention.

For example, a shipper would lose its right to demand the immediate return of emergency supplies rejected by its consignee. The carrier would have to insist on a new air waybill, and the decision of the court below provides no guidance as to which party has the duty to make out that air waybill. Where the shipment involves perishable goods or biological products, the damage from the delay might be irreparable. This result is simply untenable, particularly in the time-sensitive marketplace for express air services.

As FedEx explained in its petition, the decision of the court below will create chaos in the administration of the Convention's rules. The decision is inconsistent with the language of the Convention, well-established rights and responsibilities of carriers, and the manifest practicalities of the commerce they carry.

Fujitsu also contends that the archaic remedy it improperly seeks to invoke under the original Warsaw Convention has not been abated, because the original Warsaw Convention remains in force for countries that have not ratified either The

Hague Protocol or Montreal Protocol No. 4.[3] Fujitsu even asks the rhetorical question whether "the United States is no longer a 'High Contracting Party' to Warsaw." Brief in Opposition at 6.

This argument fundamentally mischaracterizes the question. Both The Hague Protocol and Montreal Protocol No. 4 apply their amendments only to international carriage of cargo between states party to those instruments.[4] Thus, the fact that the original Convention remains in force for countries party only to that instrument does not change the fact that the Protocols—as between countries that are party to them, *e.g.*, Japan and the United States—repealed, or abated, a court's power to grant Fujitsu the remedy it seeks. Courts cannot apply provisions of a treaty no longer in force between those countries. *See* Petition at 10-11.

In support of its argument, Fujitsu cites two cases, neither of which deals with the doctrine of abatement. Both cases, *Haver v. Yaker* and *U.S. v. Kodiak*, deal with the applicability of a treaty to private persons in the interval between the signing of the treaty and its mutual ratification, effecting an

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[3] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as amended by the Protocol done at The Hague on September 28, 1955, Sept. 25, 1975, TIAS No. _____, *reprinted in* ICAO DOC. No. 9148 (1975). The text of Montreal Protocol No. 4 appears in the Lodging Material at 37-43.

[4] *See*, The Hague Protocol, art. XVIII and Montreal Protocol No. 4, art. XIV, which by their terms apply the Amended Convention "to international carriage as defined in Article 1 of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two Parties to this Protocol or within the territory of a single Party to this Protocol with an agreed stopping place in the territory of another State."

entry into force.[5] These cases are not relevant because the amendments reflected in The Hague Protocol and Montreal Protocol No. 4 are in force for both Japan and the United States.

CONCLUSION

The brief in opposition reflects the confusion that will be created by the decision below, and affirms the need for this Court to grant the petition for a writ of certiorari.

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[5] Brief in Opposition at 8-9, citing *Haver v. Yaker*, 76 U.S. 32 (1869) and *United States v. City of Kodiak*, 132 F.Supp. 574 (D. Alaska 1955). Fujitsu's brief also cites to 87 C.J.S. *Treaties* § 14 to which the district court in the then-Alaskan territory referred, but that section now deals with conflicts between acts of Congress and treaties. The language cited by the court now appears in 87 C.J.S. *Treaties* § 8 (2000).